Aero Ambulance Service, Inc. and Local 617, International Brotherhood of Teamsters, AFL-CIO.

Cases 22-CA-20950 and 22-RC-11132

February 17, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On September 19, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. On April 17, 1998, the Board remanded the case to the judge to make a credibility resolution and additional findings of fact. On July 23, 1998, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Aero Ambulance Service, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Chevella Brown-Maynor, Esq., for the General Counsel.

In his September 19, 1997 decision, the judge found that Supervisor Joseph Cutrona unlawfully interrogated employee Michael Goldblatt. The Respondent did not then except to this finding. In its exceptions brief regarding the judge's July 23, 1998 supplemental decision, the Respondent now contends that the finding was erroneous. We find that this matter is not the subject of a timely exception. Accordingly, we adopt pro forma the judge's finding that Cutrona unlawfully interrogated Goldblatt.

In adopting the judge's discrediting, in his supplemental decision, of Cutrona's testimony that he did not inform the Respondent's management of the union activities of Goldblatt and employee Guy Greene, Member Hurtgen relies only on Goldblatt's credited testimony that Cutrona told him after Goldblatt's suspension that he was suspended because he signed a card for the Union.

In finding that the Respondent had knowledge of Greene's and Goldblatt's union activities, Member Brame relies solely on the judge's credibility resolution discrediting Cutrona. Further, in adopting the judge's finding that Goldblatt's discharge violated the Act, Member Brame relies on Goldblatt's credited testimony that Cutrona told him that the Respondent was suspending him (the suspension turned into a discharge the next week) because Goldblatt had signed a union authorization card.

Jed Marcus and Patricia Hardaway, Esqs. (Grotta, Glassman & Hoffman, P.A.), of Roseland, New Jersey, for the Respondent.

Zachary Schneider, Esq. (Schneider, Goldberger, Cohn, Finn, Solomon, Leder & Montalbano), P.C., of Kenilworth, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed on October 10, 1995, and a first, second, and third amended charge filed on October 31, 1995, January 24 and March 19, 1996, respectively, by Local 617, International Brotherhood of Teamsters, AFL—CIO (the Union), a complaint was issued by Region 22 of the Board on March 28, 1996.

The complaint essentially alleges that Aero Ambulance Service, Inc. (Respondent) unlawfully (a) interrogated its employees concerning their activities in behalf of the Union; (b) more strictly enforced its rules regarding eating, drinking and smoking in company owned vehicles; and (c) discharged employees Michael Goldblatt, Guy Greene, and Thomas Hoehl. Respondent's answer denied the material allegations of the complaint.

On March 28, 1996, the Regional Director issued a report on challenged ballots, order consolidating cases and notice of hearing, which consolidated for hearing Case 22–CA–20950, as to which the complaint, discussed above, was issued, and Case 22–RC–11132, which involves the challenged ballots of Goldblatt, Greene, and Hoehl. On December 9–12, 1995, a hearing was held before me in Newark, New Jersey.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, having an office and place of business in Hackensack, New Jersey, has been engaged in the business of providing medical transportation in the form of ambulance and invalid coach transportation. During the past year, in the course of its business operations, Respondent derived gross revenue in excess of \$500,000 from the provision of its services, and during the same period of time, it purchased and caused to be delivered to its New Jersey facility goods and materials valued in excess of \$5000 directly from suppliers located within New Jersey which suppliers, purchased and re-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ The petition was filed by the Union on October 10. A Stipulated Election Agreement was executed by the parties and approved by the Regional Director on October 23, 1995. An election was held on December 8 and 9, 1995, in a unit consisting of all full-time and regular part-time, per diem and weekend emergency medical technicians (EMT's) and passenger assistant technicians (PAT's) employed by the Employer at its Hackensack, New Jersey facility, excluding all office clerical employees, guards, dispatchers, the crew chief, the assistant crew chief, lieutenants, the president, the chief of operations, and supervisors as defined in the Act. The election resulted in a vote of 11 ballots for the Union, 11 ballots against the Union, and 4 challenged ballots. In addition to the three dischargees, the ballot of David Pardi was challenged. In the Report on Challenged Ballots, the Director overruled the challenge to Pardi's ballot, and his status is not before me. I shall direct that Pardi's ballot be opened and counted as set forth herein.

² All dates hereafter are in 1995 unless otherwise specified.

ceived those supplies directly from sources outside New Jersey. During the same period of time, Respondent derived gross revenue in excess of \$50,000 from the provision of its services to various health care and/or educational institutions within New Jersey which are directly engaged in interstate commerce.

Respondent admit, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Union Organizing Effort

Respondent employs about 80 employees, 60 of whom are emergency medical technicians (EMT), who drive its ambulances and other vehicles in transporting patients to and from medical facilities, and their homes.

Beginning in about May or June 1995, employee Guy Greene began speaking with other employees regarding obtaining a union to represent them. Employee Michael Goldblatt and Thomas Hoehl confirmed that he spoke with them and others concerning a union.

On September 21, Greene phoned the Union to inquire about representation, and on September 25, he met with Union Secretary-Treasurer Vincent DeMaio who gave him authorization cards that day. By then, Greene had spoken with a majority of the day-shift employees concerning the Union.

After receiving the cards, Greene immediately began soliciting his coworkers for their signatures. Goldblatt acted as a "lookout" to ensure that no management officials watched Greene's solicitation.

On September 28, by which time Greene had obtained signatures of about 20 employees, he spoke with admitted Supervisor and crew chief Joseph Cutrona about the Union. Greene approached Cutrona and said that he and other employees were organizing a union, and asked if he wanted to sign a card. Greene testified that Cutrona replied that Greene would not be able to have other workers sign cards. Greene answered that he already had a majority of employees signed up. Cutrona then said that he would sign a card if his card was needed, otherwise he would wait for the election and vote for the Union. According to Greene, Cutrona told him that unionization was impossible because Respondent would fire everyone. Cutrona conceded speaking to Greene, but stated that the conversation occurred on October 5, as set forth below.

On October 4, Union Official DeMaio visited the Respondent in the morning and told its president David Gato that a majority of employees had signed cards for the Union to represent them. DeMaio requested recognition, and Gato said that he had to check with his partner, and would contact DeMaio. On October 9, DeMaio was informed that Respondent would not recognize it. On October 10, the Union filed a petition in Case 22–RC–11132.

Cutrona testified that he heard employees discussing union representation shortly before the October 4 visit of DeMaio, and after his visit.

Goldblatt testified that on the day of the Union's visit, he was asked by Cutrona to have a "private" conversation. Cutrona asked him if he signed a card, and Goldblatt admitted that he had. Cutrona got very upset and said, "[W]ell, that makes everyone." Cutrona then told Goldblatt that the Union was bad,

and that a union should not represent the employees. Cutrona also asked him why he signed a card.

Cutrona testified that Goldblatt approached him, volunteered that he signed a card for the Union, and asked whether the company knew whether he signed a card, attributing management's "attitude" toward him to the Respondent's knowledge of his union activities. Cutrona replied that he did not know who signed cards. Goldblatt asked Cutrona how he felt about the Union, and what unionization could mean for the Company. Cutrona answered that Goldblatt should ask the person who solicited him to sign the card. Cutrona denied asking Goldblatt if he signed a card.

Cutrona stated that on October 5, Greene voluntarily told him that he had obtained nearly all, or all the employees to sign cards for the Union, and asked him to sign a card. Cutrona told him that he did not want to be involved with the Union. Cutrona stated that Greene told him that he was "pretty active" in his union activities. Cutrona conceded that employees asked him what changes would occur if the Company was organized. He told them to do what they believed was best for themselves, and to vote as they saw fit.

Cutrona further testified that he did not tell anyone in management about his conversations with Greene and Goldblatt concerning the Union, and that the only conversation he had with company officials about the Union was their advising him that the Union had appeared at its offices, and they had "thrown" them out.

In short order following the these conversations, and the Union's demand for recognition, three discharges occurred—Greene on October 6, Goldblatt was suspended on October 6, and discharged on October 12, and Hoehl, on October 27.

The union activities of employee Thomas Hoehl consisted of his speaking to Greene and Goldblatt concerning the benefits and disadvantages of obtaining union representation. They spoke during work, at breaktime, and outside work. Hohel signed a card for the Union.

B. The Discharges

1. Guy Greene

Greene was employed from December 1994 to October 1995, as an EMT driver.

By letter dated October 6, Greene was discharged. The letter stated that "after careful consideration of the incident in which you were involved on September 27, your employment with Aero Ambulance is terminated, effective immediately."

Greene testified that on that day, he and his partner picked up a patient and a "dysfunctional spouse" at the Holy Name Hospital for transport home. They were put in the ambulance when Greene noticed a volunteer ambulance from another company blocking their exit.

Greene went into the hospital and asked whose vehicle it was. The driver became irate and upset and said that private ambulances, such as Respondent's, should not be using the emergency room parking area. Greene told the driver to move his ambulance, explaining that he was anxious to leave as the patient was elderly, the weather was cold, and he could not run the engine to generate heat because of the proximity to the emergency room. The other driver replied that those circumstances were "too bad" and that Greene would have to wait.

Greene got into the volunteer ambulance, drove it 4 to 6 feet where it was not blocking his ambulance, then moved Respondent's ambulance into position to leave, and then returned the volunteer ambulance to its original position.

The driver yelled that Greene should not have moved his ambulance, to which Greene replied that the incident was over, they should not argue about the matter, and both of them were trying to help people. The two drivers shook hands and left. At that point, two hospital security guards asked what happened, and they replied that the matter was finished. Greene completed the transport safely.

Greene testified that upon his return to the office, he was told by Kahlert that he had received phone calls from the police in the volunteer ambulance's location, and that he had also spoken to the volunteer squad, and a nurse at the hospital. Kahlert told Greene that since he had handled the situation well, there would be no discipline issued. However, Kahlert warned him not to move another ambulance because the driver of that vehicle could claim that he stole something from the ambulance.

Greene stated that he did not receive any discipline that day as a result of this incident, and was not told that it might result in his termination. Nine days' later, a letter dated October 6 was sent to Greene, as set forth above, terminating him. Green further testified that, following his conversation with Kahlert, nothing was said to him about the incident until he received the letter of October 6. He also noted that he worked his last workday, Friday, October 6, as usual, and nothing was said to him by Respondent concerning his termination. He received the letter terminating him on October 7.

Kahlert testified that on September 27, he did not know that Greene, or any other employee was involved in union organizing. Kahlert prepared a disciplinary report which documented the actions he took. Thus, on September 27, Kahlert was informed about the Holy Name Hospital incident by the local police, who said that Green was yelling and very abusive to the volunteer crew, and was confrontational. According to the report, Greene demanded that the crew move their vehicle, and they said they would do so as soon as they gave their report to the nursing staff. They had just brought a patient into the emergency room. Greene then moved their vehicle. The police suggested that he speak to the hospital's security department. Kahlert called hospital security that day, but the director of security was not available.

Kahlert further testified that that day, he asked Greene what happened. Greene told him that the volunteer crew would not move their vehicle, although he asked them several times to do so. He also told Kahlert that he would not tolerate anyone pointing a finger in his face. Kahlert told him that he appreciated that no physical contact had taken place, and if it had, he would be terminated immediately, but that he intended to investigate the matter further. Kahlert asked Greene if he moved the other vehicle. Greene hesitated. Kahlert told him he might as well tell him what happened since he already spoke to the police and would speak to hospital security. Greene then admitted moving the other ambulance. Greene denied being told by Kahlert that he would conduct an investigation.

The following day, September 28, Kahlert tried again to call the director of security, but he was not available. Kahlert spoke to Greene's partner, who advised that Greene and the volunteer crew member were shouting and yelling at each other, and that Greene moved the other vehicle. Kahlert thanked Greene's partner for not getting involved.

The following day, September 29, Kahlert called the hospital's director of security, who said that there was a verbal con-

frontation between the two drivers, which arose from Greene's telling the volunteer crew that two persons were not needed to make a report to the nursing staff, and his repeated demands that they move the ambulance immediately. According to the security director, "everyone got loud" and the matter got "out of hand." The nursing staff called security because of their concern for the patients in the area. The director asked the people involved to leave the hospital.

That day, Kahlert visited the home of the patient who was transported by Greene on September 27. His reason for interviewing the patient was to make sure that the patient was not upset, and because he wanted to ensure that he had the correct information before imposing discipline. Kahlert has visited patients in the past where it was alleged that the crew acted improperly. In this case, the patient was not able to communicate with Kahlert. Kahlert then told Greene that the matter was still under investigation. Greene again denied being told that by Kahlert

On the next business day, Monday, October 2, Kahlert spoke to owner Dave Gato and recommended discharging Greene, effective at the end of the week, Friday, October 6, in order to permit Greene to be paid for the week. They both questioned whether they should permit Greene to work the rest of the week since they both agreed that he "could probably ruin a vehicle." However, Kahlert explained that since Greene knows that he is under investigation he would not do anything to create a problem between then and Friday, and in any event does not know that the investigation was completed. Kahlert stated that when he recommended Greene's discharge on October 2, and when he sent the letter of discharge on October 6, he was not aware of Greene's union activities.

Kahlert stated that he told Greene to see him at the end of the day on October 6. Greene asked what it was about. Kahlert replied that he had finished his investigation. Greene did not appear. Greene denied being asked to see Kahlert on that day.

When asked why he waited until October 6 to fire Greene, Kahlert replied that he was a "sucker," that he was a former union business agent, who tried to be fair to employees, and did not want to impose the "ultimate penalty" of discharge lightly. Kahlert conceded that although he was discharging Greene for improperly moving another company's vehicle, and for being involved in a confrontation, he permitted Greene to drive Respondent's vehicles for a full week because he wanted Greene to be paid for the week, but made a mistake in doing so.

Other Discipline Imposed upon Greene

On April 26, Greene and his partner were suspended for asking travel directions to a nursing home from the hospital at which they picked up a patient, and for leaving the patient's medical records at the hospital. Cutrona recommended that Greene be suspended for 1 week, but upon Greene's protest that the personnel manual did not prohibit asking directions, the suspension was reduced to 2 days.

On June 11, Greene received a written warning for carelessness, and failure to follow instructions by improperly "locking down" his vehicle. According to the discipline report, the supervisor found the keys to the ambulance in the vehicle, and its batteries left on. Greene wrote on the discipline form that he left the vehicle open "for the purpose of staff replacing used equipment." He testified that he was told by an assistant crew chief that someone else would replace the oxygen tank, and that he should leave the vehicle's doors open. Greene conceded that

the proper lock down procedure consists of locking the vehicle, unless told otherwise.

Kahlert testified that it is the crew's responsibility to obtain or replace supplies, and that either the crew, or a supervisor must obtain the new materials.

Disptcher Keri Uhlich testified that when the oxygen tanks were low upon the driver's return to the base, he would tell his supervisor that the tank was low, and it is the supervisor's responsibility to change it. If there was no supervisor to change it, the driver should lock down his vehicle and make a note on the lock down sheet that the oxygen was low and there was no supervisor to change the tank. She stated that regardless of the oxygen tank's content, it is improper for the driver to leave the keys in the vehicle and leave the premises.

On September 19, Greene received a 3-day suspension for picking up an unauthorized patient and taking him to a hospital without checking with the office. Historically, two brothers had been transported by Respondent for dialysis to a hospital. However, for some time, only one brother was authorized to be transported, and the other brother was taken by a different company. Following past practice, Greene transported both brothers.

According to Kahlert, Respondent had not transported one brother for a long time, and it had no authorization to do so. He was told by the dispatcher that she informed Greene to take only one brother. Greene testified that he was not aware that that the company was no longer transporting the other brother, but Kahlert noted that such information was posted in the crew's quarters. Greene stated that a nurse at the hospital reminded him to pick up the other brother. Greene further testified that Company Owner Gato screamed at him that he should not have transported the other brother because a pickup was attempted only 3 days before, and the brother refused the pickup.

On September 26, Kahlert was called by an administrator from an MRI facility, who said that he did not want a driver, who happened to be Greene, at his facility again, since he was "very discourteous, abusive and not professional." Kahlert stated that he spoke to Greene who denied any impropriety. Kahlert issued a written warning, but testified, however, that he "did not intend to treat this as a discipline." Rather, it was simply a record that he spoke to Greene and warned him about his behavior. He further stated that he told Greene that if he continued to be "confrontational," he would face suspension and possible termination.

Greene testified that he was waiting for a very long time with a patient at the MRI facility, and was told that his patient would be next. However, another patient was taken before his, and Greene reminded the staff member that his patient was next. The director said that the other patient had to be taken first because he had forgotten that she was there. Greene walked away, said, "[P]hew, I can't believe it" and moved his hand in a downward motion. The nurse told him that he was disrespectful. Greene replied that his gesture was not directed toward anyone, just the "situation." Respondent's supervisor came to the facility and replaced Greene.

Greene further stated that he met with Gato and the supervisor who replaced him. Gato was told by the MRI director that he did not want Greene at the facility. The supervisor told Gato that the nurse said that the incident was a misunderstanding in that Greene did nothing disrespectful toward the director.

Greene testified without contradiction that he returned to the MRI facility two to three times after the incident.

2. Michael Goldblatt

Goldblatt was employed from March to October 1995.

As set forth above, on the day of the Union's visit to the shop, October 4, Goldblatt was asked by Cutrona whether he signed a card for the Union, and told that the Union was bad.

Goldblatt testified that 2 days' later, on October 6, he was told by Cutrona and Assistant Crew Chief Keri Uhlich that he was suspended indefinitely because he "pissed off' Kahlert. They showed him a folder containing about 10 disciplinary reports. They did not tell him that he was being suspended as a result of the reports. Goldblatt had been aware of, and had seen only one report of a warning, written by a former crew chief. As to that one, he discussed the incident with Jack Kahlert, Respondent's chief of operations, who told him that it would be expunged from his file. Goldblatt asked why he had never seen the other reports, none of which were signed by him. They answered that the reports were documentation of verbal warnings relating to his conversations with Kahlert, and were not written warnings.

Cutrona told Goldblatt not to do anything for 1 week, and that he would speak to Kahlert. Goldblatt testified that as he was leaving, Cutrona asked him whether he knew why "this is happening?" Goldblatt asked why. Cutrona replied that it was because he signed a card for the Union.

Six days later, on October 12, a letter was sent to Goldblatt which stated, without further detail, that he was informed that his employement with Respondent was terminated immediately.

Respondent's reason for discharging Goldblatt was that he falsified his timecard, and accordingly stole time, and speeding with his vehicle

Cutrona testified that on October 6, he saw Goldblatt punch in late. Shortly thereafter, as Cutrona checked all the employees' timecards, he noticed that Goldblatt had punched in at 8:14 a.m., and wrote 8 a.m. next to the punched time.

Cutrona stated that the Respondent's policy is that employees who punch in late are to leave the timecard as is. However, employees who punch in early are supposed to write the time they were supposed to report to work next to the punched time. Dispatcher Uhlich explained that the rule is meant to aid the person checking the cards to determine the employee's starting time for payment purposes. Thus, the time the employee notes on the card is the time when payment begins. Accordingly, if an employee punches in early, he is not paid for the early arrival time, and thus he is supposed to mark his regular starting time on the card. However, if the employee punches in late, the time punched is the time at which he is paid, and thus he is not supposed to place any other marks or times on the card.

Cutrona crossed out the 8 a.m. time, and told Kahlert that Goldblatt wrote that he punched in at 8 a.m. whereas he actually punched in at 8:14 a.m. Cutrona and Uhlich's interpretation of Goldblatt's actions was that Goldblatt, by writing 8 a.m. was stating that he arrived at work on time, and sought payment from 8 instead of from 8:14 a.m., thereby "stealing time" by claiming that he arrived at work 14 minutes earlier than he actually had.

Cutrona testified that he told Goldblatt that morning of his "mistake." Goldblatt told him that he was not aware of the company policy, no one had explained it to him, and that he did

not understand the rule regarding writing times on the card. Goldblatt also explained that he wrote 8 a.m. on the card because that was his regular start time. Cutrona replied that he had been shown the proper method of marking the timecard, and a sample of the procedure was posted. Cutrona told him that he was going to be written up.

Cutrona stated that he met with Kahlert, who told him to suspend Goldblatt. The following day, October 7, Cutrona and Uhlich met with Goldblatt, showed him his file, and the write-ups that he had received in the past, and told him that he was suspended for marking his card wrong and thereby stealing companytime, and because of a writeup for speeding. Cutrona told Goldblatt that he would speak to Kahlert in an effort to have him remain at work, and that Goldblatt should not do anything for 1 week.

As set forth above, Goldblatt stated that he was told by Cutrona at the end of the meeting that "this was happening," apparently referring to his suspension, because he signed a card for the Union.

At a meeting with Kahlert, Cutrona, and Uhlich told him that Goldblatt was a good worker, and asked to give him another chance. Kahlert said he would think about it.

Kahlert testified that at the meeting with Cutrona and Uhlich, he told them that Goldblatt was "constantly playing games" with the timecards, and that he should be written up, and possibly suspended. They told him that they wanted to wait 1 day and discuss the matter with him since they felt sorry for him.

Kahlert stated that on October 6, following the timecard incident, Cutrona and Uhlich "pleaded" with him not to suspend Goldblatt. He said he would think about it, but would let them know in a couple of days. On October 11, Kahlert told them that he decided to discharge Goldblatt because he was told by Cutrona that on October 7, when Goldblatt was told to punch his card and leave he went to a local restaurant, and then when Cutrona again told him to leave, he made a phone call, and then punched out.

Kahlert testified about a previous incident, on August 29, in which Goldblatt left the premises to make a personal call without permission, and punched out upon his return. He noted that he gave Goldblatt many "breaks" in the past due to similar timecard problems. However, he stated that he did not give him any more breaks after October 4 because he believed that Goldblatt was taking advantage of his "good will" and trying to make a fool of the Company. Indeed, Kahlert testified that he did not write up Goldblatt for every incident of misconduct, but that if he did, his file would be two inches thick. Kahlert stated that when he discharged Goldblatt he did not know that he was involved with the Union.

The timecard for the day in dispute showed that earlier that week Goldblatt properly wrote his start time when he punched in early.

Cutrona testified that it took a long time for Goldblatt to learn things, and that he had to repeat instructions two to three times before he understood what he was being told.

Cutrona knew of no other employee who punched in late and entered an earlier time on his timecard. Nor did he know of anyone who had been discharged for falsifying a timecard.

Regarding the alleged speeding incident, on October 5, according to Kahlert, Goldblatt was assigned to make a run, which ordinarily took 20 to 25 minutes. After the assignment was made, he noticed Goldblatt still at the premises at a time when he should have been on the road. Goldblatt made the run

in 15 minutes. Kahlert stated that since the weather at the time was foggy and drizzling, he believed that Goldblatt drove in an unsafe manner to make the pickup. However, he conceded that the run could probably be done in less than 20 minutes if the driver experienced no traffic and had green lights the entire distance.

Uhlich testified that she drove the route that Goldblatt took on the morning that he was allegedly speeding, and noted that the weather conditions were foggy and raining. Nevertheless, Uhlich did not know the traffic conditions at the time that he drove that route.

Of course, Kahlert had no way of knowing whether Goldblatt sped since he did not drive with Goldblatt and did not follow him. He only assumed, based upon the fact that the trip took 15 minutes, that Goldblatt was speeding in inclement weather. It should be noted that there was no complaint from the nursing home that he was late for the pickup, and Kahlert was not informed that Goldblatt was cited for speeding by the police. Nor was Goldblatt questioned about this incident.

Goldblatt testified that he did not know, and was never told the reason for his discharge. However, he testified at an unemployment compensation hearing that he was terminated because the Company said he tried to steal companytime. He stated that he did not recall such testimony.

Goldblatt stated that, prior to his discharge, he had not received any written warnings, and had only received one verbal warning, which was destroyed.

Eating, Drinking, and Smoking in Company Vehicles

Greene, Goldblatt, and Hoehl testified that Respondent had a policy prohibiting eating, drinking and smoking in company vehicles.³

Cutrona testified that until early 1995, employees were permitted to carry food in the ambulance in sealed containers. In January 1995, the rule was changed to prohibit the carrying of any food, sealed or not, in company vehicles.

Kahlert testified that on January 1, 1995, he issued a memo of that date, effective immediately, which stated that "there will be no eating or drinking in the vehicles. Under no circumstances are you to pick up any food or drink and transport them in the vehicles." He directed his crew chiefs to distribute the memo to all employees, and had it posted in various parts of the facility. Kahlert issued this memo because he and the supervisors found evidence of food in the vehicles, such as garbage, bags, and food particles. However, although it tried, management was unable to determine who ate in their vehicles since many crews used the vehicles during the day, and all denied being responsible.

Kahlert testified that in August 1994 he made the policy change which prohibited employees from transporting food in company vehicles. Although the employer's policy was that there was to be no eating, drinking, or smoking in vehicles, Kahlert "reposted" that policy on January 1, 1995. Nevertheless, he continued to find evidence that employees were eating in the vehicles. He stated that throughout 1995, meetings were held frequently where this policy was emphasized, and posters were prominently displayed.

³ OSHA regulations seem to permit eating and drinking in ambulance cabs if the employer has a policy permitting employees to wash and change contaminated clothing prior to entering a cab. However, it is the Respondent's policy prohibiting it, which is not being challenged as improper, which is at issue.

Judith Marsella, Respondent's office manager and dispatcher, testified that beginning in January 1995, a reinforcement and stricter enforcement of the rules began because debris from food containers was found in the vehicles.

On July 18, 1995, a "company policy" originally dated August 4, 1994, was issued, setting forth various rules, including a statement that "due to OSHA regulations there will be absolutely no eating or drinking in any of the vehicles at any time for any reason. Anyone caught violating this rule will be terminated, no questions asked and no exceptions."

Kahlert testified that the Company's disciplinary policy includes a verbal warning for the first offense, a written warning for the second offense, a suspension for the third offense, and termination for the final offense, however suspensions can be implemented immediately for such offenses as insubordination. Notwithstanding this policy, however, Kahlert stated that violation of the no eating, drinking, or smoking policy is cause for immediate termination, especially since violation of the rule is so serious, involving the likelihood of contamination of food substances. Such conduct would also violate OSHA policy and Department of Health rules.

There was some confusion concerning whether this rule was actually issued at the time set forth, or whether it was in fact issued at all. Thus, Uhlich testified that she typed it in August 1994, although she left the Company in July 1994. Respondent offered testimony that Greene received that policy statement, and he should have received it since he was hired, in December 1994, after the rule was allegedly issued. However, the copy in his personnel file does not contain the quoted rule. I need not resolve this issue since the employees were aware that eating, drinking, and smoking in the vehicles was prohibited.

Kahlert admitted that on October 9, 1995, the policy concerning no eating, drinking, or smoking was "reposted" by Uhlich.

From January until October 27, 1995, when Hoehl was discharged, no employee was found to have violated the rule. One employee, Moses Acosta, was discharged later, in the spring of 1996, for eating in the vehicle.

Kahlert testified that he and his crew chiefs conducted regular meetings in 1995, and one specifically on October 9, at which they advised employees of the Company's policies, including the no eating, drinking, or smoking. Kahlert stated that he saw Hoehl at that meeting.

Kahlert insisted that at that time Respondent was not more strictly enforcing the rule—he was just "reinforcing" it. Uhlich testified that such a meeting occurred in October 1995.

3. Thomas Hoehl

Hoehl was employed from January 1992 to July 1993, and from April to October 27, 1995.

While driving to work on October 27, 1995, Judith Marsella, Respondent's office manager and dispatcher, noticed Hoehl parked in the Company's vehicle, eating a bagel. She reported this to Gato and Kahlert. Cutrona went to the location, and saw Hoehl getting out of the vehicle, holding a soda bottle. He was discharged for eating and drinking in the vehicle. Kahlert, who discharged Hoehl, denied knowing that Hoehl had engaged in any union activities.

Hoehl testified that he and his partner stopped for a coffeebreak that day, and that he drank coffee in the vehicle. He was later told that he was suspended for drinking coffee in the vehicle. Hoehl's partner that day, David Pardi, testified that Hoehl ate a bagel and drank coffee in the ambulance. Pardi stated that he did not eat anything because it was against company rules. Pardi understood that the penalty for such an infraction was immediate termination. Pardi also confirmed that meetings were held about once or twice per month regarding the no smoking and eating rules, at which the employees were told that they would be discharged for eating, drinking, or smoking in the vehicles. Pardi first testified that in early October 1995, he saw a new posting regarding the no eating, drinking, or smoking rule, but he then stated that it may not have been a new posting, but merely a restatement of the same rule.

The General Counsel's witnesses testified that they were impliedly authorized to eat in the vehicle when the dispatcher told them to eat on the road, on their way to an assignment.

However, employee Pardi interpreted orders from a dispatcher to eat on the road on his way to the next stop, and stay in radio contact, to mean that he should stop at a pizza or hot dog stand, eat quickly, then return to the vehicle, advise the dispatcher that he had completed his lunch, and that he was continuing on his assignment.

Marsella conceded that if the driver is away from the ambulance while eating lunch, he can't hear the radio. However, since the drivers either have a pager, she can call them on the pager if they are not available by radio.

Marsella stated that during a very busy day, when the driver is not able to take a full 30-minute lunch, she advises him to "grab a piece of pizza or a hot dog." She will then attempt to provide more time later in the day. By advising the employees to take a fast lunch, which may encompass 15 minutes, she intends that they get out of their vehicle at those food places, eat, and resume their assignments. She did not recall telling employees to get their food on the way to the next stop.

Kahlert testified that on about January 9, 1995, he conducted a meeting of employees at which he and Cutrona emphasized the importance of the rule, and told the workers that they would discharge any employee violating it.

The purpose of the rule was to avoid contamination of food products with a patient's body fluids or other infectious material.

Cutrona testified that after a meeting at which the Company's rule prohibiting eating and drinking in the vehicles was discussed, he saw Hoehl walk to an ambulance to make a pickup. He was carrying a soda bottle. Cutrona told him that he was not allowed in the ambulance with a drink. Hoehl said he forgot, spilled it out, and went on the run.

On June 13, 1995, Hoehl was given a verbal warning and a 2-day suspension for "insubordination" and "improper conduct." On that day, Hoehl walked into an ambulance with a cigarette. Cutrona testified that he told Hoehl that he could not smoke in the truck. Hoehl replied that he was "fucking done," and threw it onto the ground. Cutrona told him to get out of the truck and pick it up. Hoehl responded, "[N]o. fuck off, I'm going to do my call. You pick it up." Cutrona told him that when he was finished with his call, he should see him as he was being suspended. The employee disciplinary report states that Hoehl dropped the cigarette out of the window of the vehicle.

Kahlert testified that he spoke to Hoehl about the incident, and a note attached to the report states that Kahlert spoke to him about his smoking in the vehicle, and that if he is caught doing so again or is insubordinate he would be terminated. According to Kahlert, Hoehl told him that he smoked outside the vehicle. Hoehl denied being told by Cutrona or Kahlert that

his offense was smoking in the vehicle, and denied speaking at all to Kahlert concerning this incident. Rather, he stated that his suspension was for insubordination.

The disciplinary report supports Hoehl's testimony. It states only that Hoehl was told by Cutrona "to pick up his cigarette that he dropped out of the window . . . Tom told me fuck you and drove away. . . . As crew chief of Aero this is insubordination and improper conduct."

Cutrona testified that he did not discharge Hoehl for smoking in the vehicle, pursuant to the Company's rule, because he simply entered the truck and threw the cigarette out immediately. Thus he was disciplined for improper conduct and insubordination, and not because he was smoking in the vehicle.

Hoehl admitted knowing that Respondent's policy prohibited eating, drinking, or smoking in company vehicles, but stated that the policy was not enforced until the union organizational campaign. Moreover, Hoehl stated that he has on numerous occasions eaten or drank in the vehicle with Cutrona, Uhlich, and other employees.

Hoehl concedes that he was never told to eat in the vehicle. However, he states that when he was told to eat on the road by dispatchers or other supervisors, he interpreted that to mean that he should eat in the vehicle on the way to or from a run. He added that he rarely had time to go to a cafe or luncheonette. When he was told to eat on the road, he was on his way to another stop, and had just about enough time to get there. When he was told to pick up food on the way, he did not have time to stop to eat out of the vehicle.

He further stated that shortly after the Union's advent, he saw a handwritten notice, on October 13, which stated that, effective immediately, eating, drinking, or smoking in company vehicles was prohibited, and violation of the rule would result in termination. He denied being present at any company meeting at which this policy was discussed. In this connection, Cutrona denied that any new rule was implemented in October 1995

Hoehl testified that about 1 week after he saw the note, he was told by Gato to eat on the road and be available by radio. Inasmuch as Hoehl only had a hand held radio in the vehicle, he had to sit in the vehicle in order to answer the dispatcher's call. On that occasion, he ate lunch in the vehicle, answered the runs, and returned to base where he threw the trash out in front of Cutrona. He received no discipline that day.

Analysis and Discussion

Guy Greene

Greene was the main union organizer in the shop. He initiated efforts to organize Respondent by contacting the Union, speaking to employees and soliciting their membership in the Union, obtaining the signatures of 20 employees, and even asking Supervisor Cutrona to sign a card. Greene advised Cutrona that he had signed up a majority of the employees. Cutrona admitted being told by Greene that he had "pretty active" union activities, and that he had signed up all or nearly all the employees.

Although Cutrona denied speaking to his superiors about Greene's activities, since Cutrona was an admitted supervisor, Respondent is chargeable with his knowledge. "Activities, statements, and knowledge of a supervisor are properly attributable to the employer." *Pinkerton's, Inc.*, 295 NLRB 538 (1989).

Accordingly, when the Union visited the shop on October 4, and requested recognition based upon the fact that the Union represented a majority of Respondent's employees, Respondent possessed knowledge of Greene's extensive union activities, and the fact that he had obtained signatures in behalf of the Union from a majority of its employees.

The timing of Greene's discharge, on October 6, only 8 days after his conversation with Cutrona, and only 2 days after the Union's visit, supports a finding of unlawful motivation in his termination.

Animus toward the Union is amply demonstrated in Cutrona's telling Greene, which testimony I credit, that unionization would be impossible since Respondent would fire everyone

Accordingly I find and conclude that the General Counsel has proven that Greene's union activities were a motivating factor in Respondent's termination of him. *Wright Line*, 251 NLRB 1083 (1980). The burden then shifts to Respondent to prove that it would have discharged Greene even in the absence of his union activities. *Wright Line*, supra.

The asserted reason for Greene's discharge, as set forth in the letter of October 6, was the incident involving his moving the ambulance of another company on September 27. I cannot find, however, that Greene was validly discharged for that incident

Kahlert was made aware of the incident on the day it occurred, September 27, by the local police. He testified that he conducted an investigation from September 27 through 29, and then, on October 2, made the decision to discharge Greene. Nevertheless, Greene was not informed of the decision to fire him until October 6, 2 days after the Union appeared at the shop.

The General Counsel argues, and I agree, that Greene's conduct was condoned by Respondent. I credit Greene's testimony that after informing Kahlert of the incident, and after Kahlert's speaking to the police, the ambulance squad and a nurse on September 27, Kahlert told him that no discipline would be issued, and he was only verbally warned not to move another company's ambulance. I further credit Greene's testimony that he was not told that Respondent was conducting an investigation of the incident.

Respondent's reasons for not terminating Greene until October 6 do not ring true. Thus, according to Kahlert, on October 2, he reached a decision to discharge Greene, but did not actually do so for another 4 days, until October 6. On October 2, Kahlert and Gato spoke about whether to discharge Greene immediately or permit him to work a full week. Their reasons for delaying his actual discharge cannot be believed. Thus, they decided to permit Greene to work a full week, notwithstanding that Greene "could probably ruin a vehicle," because Kahlert was a "sucker" who tried to be fair to employees, and did not want to impose the ultimate penalty of discharge lightly.

When viewed in light of Respondent's summary discharges of Goldblatt and Hoehl on the day they committed their alleged offenses, Respondent's delay in discharging Greene is not in accordance with Respondent's practice, and is not believable. It is incomprehensible that Kahlert and Gato would have permitted Greene to continue to drive an extremely expensive company vehicle, possible with a patient inside, believing that he could "ruin" it.

The facts reasonably support a finding that Respondent condoned Greene's conduct with respect to the September 27 incident, as it had his prior misconduct, and that having done so, it created a scenario of investigation and leniency toward Greene.

Consistent with the practice utilized with Goldblatt and Hoehl, it is obvious that Greene would have been discharged on September 27, when the incident came to the attention of Kahlert, or at the latest on October 2, when he and Gato discussed it. Rather, it appears that Respondent only took action against Greene following the Union's appearance at the shop on October 4, and upon their placing the responsibility for such appearance on Greene.

Respondent attempted to prove that it discharged Greene for the September 27 incident, and for other incidents which occurred in the past. Thus, as discussed above, an incident involving his confrontation at the MRI facility only resulted in a warning, which Kahlert did not consider to be discipline, and despite the administrator of the MRI facility demanding that Greene not be sent there again, Greene gave uncontradicted testimony that he continued to be dispatched to that location.

As to the other infractions, the discipline imposed upon Greene for failing to take a patient's chart, improperly locking down his vehicle, and transporting an unauthorized patient, were either remote in time to the discharge, or were remedied by discipline imposed at the time of the incident. Respondent retained him after all these events.

I cannot find that progressive discipline was imposed upon Greene for these incidents, which then resulted in his discharge for the September 27 incident. Respondent did not follow its progressive disciplinary procedure. Thus, although such procedure provides for a counseling and verbal warning for the first offense, Greene was suspended for his first offense of leaving the medical records, and then received a warning for improperly locking down his vehicle, followed by a suspension for picking up an unauthorized passenger, and then a warning concerning the MRI incident.

With respect to the MRI incident, it appears that although Greene was confrontational with respect to the staff there, and received only a warning for such conduct which was not considered discipline, nevertheless when he was again confrontational a short time later with the ambulance driver from another company, such later conduct was sufficient to discharge him immediately. However, it did not do so. That such later conduct occurred only a short time after Greene's extensive union activities became known to Respondent, and 2 days after the Union demanded recognition leads to the obvious conclusion that Respondent's discharge of Greene was motivated by his union activities.

I must note that Greene was by no means an exemplary employee, and engaged in misconduct for which he was disciplined, around the time of the Union's appearance at the shop. However, this record does not support a finding that Respondent would have discharged him for the September 27 incident in the absence of his union activities.

Although Respondent repeatedly continued to permit Greene's allegedly unacceptable behavior without discharging him, it nevertheless discharged him only after the Union's advent. *Gravure Packaging*, 321 NLRB 1296, 1306 (1996).

Based on all of the above, I find and conclude that Respondent has not proven that it would have discharged Greene in the absence of his union activities. I therefore find that Greene's discharge violated Section 8(a)(3) and (1) of the Act.

Michael Goldblatt

Goldblatt's union activities consisted of discussing the Union with Greene and Hoehl, and serving as a "lookout" while Greene solicited other employees. In addition, Goldblatt credibly testified that on October 4, the day on which the Union demanded recognition, Cutrona asked him if he signed a card for the Union, which Goldblatt admitted doing. Cutrona also asked Goldblatt why he signed the card, and told him that the Union was bad. In addition, according to Goldblatt's credited testimony, Cutrona told him, as set forth above, that the suspension was effected because he signed a card for the Union. Cutrona admitted that Goldblatt volunteered that he had signed a card.

Goldblatt's credibility is subject to some doubt. He insisted that he did not know, and was not told why he was discharged, however his testimony at the unemployment compensation hearing was that he was advised that he was terminated because he stole companytime. Notwithstanding that lapse, I credit Goldblatt's testimony over that of Cutrona's denials of parts of it essentially because Cutrona admitted having a conversation about the Union with Goldblatt, and because Cutrona corroborated that part of Goldblatt's testimony in which Cutrona asked him not to do anything about his discharge for 1 week.

Based on the above, particularly, Cutrona's knowledge that Goldblatt had signed a card for the Union, the timing of the suspension, only 2 days after Cutrona's unlawful interrogation, and Cutrona's advice to Goldblatt that he had been suspended because he signed a card for the Union, I find and conclude that the General Counsel has proven that Goldblatt's union activities were a motivating factor in Respondent's termination of him. Wright Line, 251 NLRB 1083 (1980). The burden then shifts to Respondent to prove that it would have discharged Goldblatt even in the absence of his union activities. Wright Line, supra.

The reason given Goldblatt at his suspension was that he had "pissed off" Kahlert. His termination letter simply states that he was "terminated effective immediately." At the time of his suspension, Goldblatt was presented with a file containing certain disciplinary reports. Goldblatt testified here that he had seen only one of the reports, and that one was supposed to have been destroyed, and that he had not been disciplined by Respondent. He asked for copies but Cutrona refused to supply them

At hearing, Respondent contends that Goldblatt was discharged for stealing companytime, by punching in at 8:14 a.m. but writing 8 a.m. next to it. Company procedure requires that employees punching in late to leave the time punched without making any marks in it, so that they are paid from their entry time.

Even Respondent's supervisors could not confirm that Goldblatt intentionally attempted to steal companytime by improp-

⁴ I find that by asking these questions, Cutrona unlawfully interrogated employees in violation of Sec. 8(a)(1) of the Act, as alleged in the complaint. I accordingly deny Respondent's motion to dismiss this allegation because Greene's testimony was allegedly contrary to Goldblatt's. Although Cutrona may have supported the Union before it became known to senior management, it appears that his attitude changed once Respondent's officials became aware of the Union's interest in representing the employees. Such a change in position is understandable once Cutrona learned of Respondent's feelings about the Union, particularly where he was told that they "threw [the Union representatives] out of the building."

erly writing his starting time on the timecard. Supervisors Cutrona and Uhlich testified that Goldblatt did not understand this rule despite repeated instructions, and they stated that he told this to them at the time of his suspension. Cutrona conceded that it took a long time for Goldblatt to learn things. Further, Goldblatt credibly testified that he did not understand the timecard punching procedure, and that he wrote his regular starting time regardless of whether he arrived early or late.

It appears that Goldblatt did not understand the procedure for marking his timecard, as he explained to Cutrona when his "mistake" was discovered by Cutrona. Thus, he seemed to always be in the habit of writing his correct time on the card, whether he arrived early or late, as he apparently believed that that was the correct procedure. In fact, he told this to Uhlich at the time that he spoken to by her and Cutrona, and he testified that that was his belief as to the procedure to be followed.

Thus, I do not believe that this was a case of a deliberate attempt to steal companytime. The actions of Cutrona and Uhlich in "pleading" with Kahlert not to discharge Goldblatt because he was a good worker, support a finding that Respondent did not believe that Goldblatt had committed the serious offense of stealing time. Rather, it appears that Respondent seized upon Goldblatt's repeated, and condoned failure to mark his timecard in the proper manner.

The other reason given at hearing for Goldblatt's discharge was that Kahlert believed that he was speeding on October 5. I cannot accept Kahlert's assumption that Goldblatt sped on his run, based only upon the time he left the shop and the time he arrived at the pickup. Kahlert conceded that the run could be performed in less than the amount of time allotted if Goldblatt had no traffic, and made all the traffic lights. It does not appear that Goldblatt was questioned about whether this occurred, but rather that Kahlert rushed to judgment in assuming that he sped.

With respect to the other alleged misconduct committed by Goldblatt in the past, it appears that all such conduct was condoned. Thus, Kahlert conceded that if he issued Goldblatt a written discipline for each instance of misconduct, he would have a file that was 2 inches thick.

Based on all of the above, I find and conclude that Respondent has not proven that it would have discharged Goldblatt in the absence of his union activities. I therefore find that Greene's discharge violated Section 8(a)(3) and (1) of the Act.

Thomas Hoehl

Hoehl's union activities were minimal, consisting of speaking to coworkers Goldblatt and Greene about the Union, and signing a card for the Union. Notwithstanding that Greene informed Cutrona that all or nearly all the employees had signed cards for the Union, I cannot find that the General Counsel has made a strong showing that his discharge was motivated by his union activities. *Wright Line*, supra.

However, even if such a showing had been made, I find that Respondent has established that it would have discharged Hoehl even in the absence of his union activities. *Wright Line*, supra.

The three dischargees admitted that it was a longstanding violation of company rules to eat, drink, or smoke in company vehicles. Hoehl conceded that he was aware that a violation of that rule was cause for termination. However, they contended that the rule was not enforced.

As evidence of its nonenforcement there was testimony concerning their being told to eat on the road on the way to the next assignment. However, none could specifically testify that he was given a direct order to eat in his vehicle. Rather, they interpreted such instructions to mean that they could eat in their vehicles in order to arrive at the stop on time.

However, employee Pardi's testimony, which I credit, makes more sense in view of the rule which was acknowledged by the dischargees. Thus, Pardi interpreted the rule as meaning that they were to stop at a fast food establishment, eat quickly, and continue to the next assignment.

I reject the General Counsel's witnesses' testimony that by telling the employees to remain in radio contact during their lunch break, the dispatcher was impliedly directing them to eat in their vehicle. They do not contend that they were told to eat in the vehicle. Moreover, they could have remained in contact as testified by dispatcher Marsella, through their pager, or, as testified by Pardi, they were supposed to eat quickly, and upon their return to the vehicle report to the dispatcher that they were available for a call.

Accordingly, I find that no specific order was given to the employees that they eat in the vehicles. Indeed, it was conceded by Hoehl that such conduct would result in termination.

As further evidence of lack of enforcement of this policy, there was testimony by Hoehl that he ate in the vehicle with Supervisor Cutrona, and that he threw out lunch trash in front of him when he returned from a run. I credit Cutrona's denial that he ate in the vehicle. Furthermore, there is no evidence that Cutrona saw Hoehl deposit the trash.

I find, based on the evidence, that Respondent did not begin to more strictly enforce its rules concerning eating, drinking, or smoking in company vehicles on October 9, as alleged in the complaint. Rather, as testified by Respondent's witnesses, who I credit, I find that its rule prohibiting eating, drinking, or smoking in the vehicles had been in effect since at least January 1.

Even as testified by the General Counsel's witnesses, there was no misunderstanding concerning the rule—such activities were prohibited, and the punishment for a violation thereof was termination. There may have been a reposting of the rule or a reemphasis of it in October 1995, but the rule, as promulgated in January 1995, remained constant.

Hoehl violated the rule on October 27 by eating in his vehicle, and was validly terminated for that reason. I accordingly find that Respondent has met its burden of proving that Hoehl would have been discharged even in the absence of his union activities. *Wright Line*, supra.

III. THE REPRESENTATION CASE

The Challenged Ballots

The ballots of Michael Goldblatt, Guy Greene, and Thomas Hoehl were challenged by the Board agent as they were not on the list of eligible voters. Respondent contends that they were discharged for cause prior to the election. The Union argues that they were discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act.

It follows from my conclusions, set forth above, that Goldblatt and Greene were discriminatorily discharged, and that the challenges to their ballots must be overruled. I find, therefore, that Goldblatt and Greene were entitled to employee status on the date of the election. I shall therefore recommend that the challenges to the ballots of Goldblatt and Greene be overruled, and that the two ballots be opened and counted. I shall also recommend that the ballot of David Pardi, as to which the challenge to his ballot has been overruled by the Regional Director, be opened and commingled with the ballots of Goldblatt and Greene, and counted.

It further follows from my conclusions, set forth above, that Hoehl was not discharged in violation of the Act, and that the challenge to his ballot must be sustained. I find, therefore, that Hoehl was not entitled to employee status on the date of the election. I shall therefore recommend that the challenge to the ballot of Hoehl be sustained, and that his ballot not be opened or counted

CONCLUSIONS OF LAW

- 1. Respondent, Aero Ambulance Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union, Local 617, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Michael Goldblatt and Guy Greene, Respondent violated Section 8(a)(3) and (1) of the Act.
- 4. By interrogating employees about their union activities and membership, Respondent violated Section 8(a)(1) of the Act.
- 5. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 6. Respondent has not violated the Act, as alleged in the complaint, by discharging Thomas Hoehl, or by on about October 9, 1995, beginning to more strictly enforce company rules regarding eating, drinking, or smoking in company owned vehicles.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Aero Ambulance Service, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discharging or otherwise discriminating against any employee for supporting Local 617, International Brotherhood of Teamsters, AFL–CIO, or any other union.

- (b) Coercively interrogating any employee about union support or union activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Michael Goldblatt and Guy Greene full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (b) Make Michael Goldblatt and Guy Greene whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify Michael Goldblatt and Guy Greene in writing that this has been done and that the discharges will not be used against them in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in Hackensack, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondents authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 1995.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 22–RC–11132 be, and it is, severed from Case 22–CA–20950 and that it be, and it is, remanded to the Regional Director for Region 22, and that the challenges to the ballots of Michael Goldblatt, Guy Greene, and David Pardi which were cast in the representation election conducted on December 8 and 9, 1995, be, and they are, overruled and that the Regional Director be, and he is directed to open and count the challenged ballots of Michael Goldblatt,

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purnoses.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Guy Greene, and David Pardi, and to prepare and serve upon the parties a revised tally of ballots and an appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 617, International Brotherhood of Teamsters, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Goldblatt and Guy Greene full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Goldblatt and Guy Greene whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Michael Goldblatt and Guy Greene, and wE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

AERO AMBULANCE SERVICE, INC.

Chevella Brown-Maynor, Esq., for the General Counsel.

Jed Marcus and Patricia Hardaway, Esqs. (Grotta, Glassman & Hoffman, P.A.), of Roseland, New Jersey, for the Respondent.

Sonja D. Fritts, Esq. (Cohen, Weiss and Simon, Esqs.), of New York, New York, for the Union.¹

SUPPLEMENTAL DECISION PRELIMINARY STATEMENT

STEVEN DAVIS, Administrative Law Judge. On September 19, 1997, I issued my decision in this proceeding. On April 17, 1998, the Board issued an Order remanding this proceeding to me for the purpose of making further credibility determinations and, if appropriate, new conclusions of law, and recommendations.

The Board stated that I may reopen the record for additional evidence if necessary to resolve the credibility issue or to resolve issues arising out of my credibility finding. I inquired of the parties as to their positions concerning whether the record should be reopened. No party desired that the record be reopened, and I do not believe that reopening the record is neces-

sary. Accordingly, I shall resolve the issues presented by the Board's remand based on the original hearing record.

In my decision, I found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Michael Goldblatt and Guy Greene because of their union activities. I also found that Supervisor Joseph Cutrona knew of their union activities. In my decision, I stated that Cutrona testified that he did not reveal his knowledge of such activities to anyone in management, but I did not make a credibility determination concerning that matter, instead holding that Cutrona's knowledge was imputable to Respondent.

The Board remanded this case to me (a) in order to make a credibility determination concerning Cutrona's testimony pursuant to *Dr. Phillip Megdal*, *D.D.S., Inc.*, 267 NLRB 82 (1983); (b) for a determination as to whether Respondent's management had direct knowledge of the union activities of Goldblatt and Greene; and (c) to determine whether knowledge by Respondent's management may properly be inferred from all the circumstances surrounding the discharges.

A. Knowledge of the Union Activities of Goldblatt and Greene

1. The testimony of the General Counsel's witnesses

In my decision, I credited the testimony of Greene, who stated that he told Cutrona that he was organizing a union, and that he had a majority of employees signed up. Greene stated that that conversation occurred on September 28, prior to the Union's visit 6 days' later.

I also credited the testimony of Goldblatt, who stated that on October 4, the day of Union Representative DeMaio's visit, he was asked by Cutrona if he signed a card for the Union, and when Goldblatt admitted doing so, Cutrona became angry and said, "[W]ell, that makes everyone." I further credited Goldblatt's testimony that, following his suspension, he was told by Cutrona that that action was taken because he signed a union card

I additionally credited Union Representative DeMaio's testimony that on October 4, he visited the premises and told Owner Dave Gato that a majority of Respondent's employees signed cards for the Union, and asked for recognition. DeMaio was told that Gato would have to check with his partner and asked DeMaio to call in 5 days.

2. The testimony of Respondent's witnesses

Cutrona testified that the only conversation he had with his superiors concerning the Union was on October 5, which was 1 day after the Union's visit. At that time, Gato and chief of operations, Jack Kahlert, told him that union representatives came to the premises and told them that they wanted to represent the employees, and that Gato "threw them out of the building."

Cutrona testified that the next day, he was told by Greene that Greene "was having everybody sign the cards"; Greene "got almost everybody to sign the union cards;" and that Greene told him that "I got everybody signed."

Cutrona further testified that 2 to 3 days after that conversation, he was told by Goldblatt that he signed a card.

Cutrona testified that he did not tell any representative of management about his conversations with Goldblatt and Greene.

Kahlert testified that he was advised that union representatives visited the shop and claimed to represent the employees. He further testified that Cutrona did not tell him that he had spoken to Goldblatt or Greene about the Union, and denied

 $^{^{\}rm l}$ This law firm was substituted for the prior firm which represented the Union.

knowing that they were involved in the Union at the time he decided to discharge them.

Analysis and Discussion

Credibility Determination Concerning Cutrona's Testimony

In *Megdal*, supra, the Board held that if a supervisor's testimony that he did not inform management of his knowledge of the union activities of employees is credited, such knowledge may not be deemed to have been conveyed, as a matter of law. The Board noted that a determination must be made as to whether the supervisor's denial was credible. In making such a determination, all the circumstances of the case must be considered

I do not credit Cutrona's testimony that he did not inform management representatives that Goldblatt and Greene had signed cards for the Union. Cutrona's testimony is undermined by the fact that although having been told by Goldblatt that he had signed a union card, he told Goldblatt that he did not know who signed cards.

Cutrona was admittedly told by Goldblatt and Greene that they had signed cards for the Union, and that Greene was actively involved in signing up his coworkers.

Goldblatt's credible testimony that he was told by Cutrona following his suspension that he was suspended because he signed a card for the Union, lends support to a finding that Cutrona advised Kahlert, who decided to suspend Goldblatt, that he had signed a union card.

I find it unlikely that having been told by Gato and Kahlert that the Union claimed to represent the employees, and having heard that Gato threw the Union out, that Cutrona would have remained silent in the face of such information. As a supervisor he possessed information which would have been of aid in support of Respondent's expressed hostility to unionization. Indeed, he expressed to Greene his belief that unionization would not occur since Respondent would discharge everyone.

I accordingly do not credit Cutrona's denial that he told Respondent's management of the union activities of Goldblatt and Greene.

B. Whether Knowledge by Respondent's Management may Properly be Inferred from all the Circumstances Surrounding the Discharges

Other than the knowledge possessed by Cutrona, which I found he conveyed to management's representatives, there is no evidence of direct knowledge by Gato and Kahlert of the union activities of Goldblatt and Greene.

"The Board has not hesitated to infer an employer's knowledge of employees' protected activities where the circumstances reasonably warrant such a finding," *Matthews Industries*, 312 NLRB 75, 76 (1993); *Dr. Frederick Davidowitz*, *D.D.S.*, 277 NLRB 1046 (1985).

Knowledge need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be draw. . . . The Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action (2) the respondent's general knowledge of union activities (3) animus and (4) disparate treatment. The Board additionally has relied on factors including the delay between the conduct cited by the respondent as the basis for the discipline and the actual discharge, and-in the case of multiple discriminatees-that the

discriminatees were simultaneously discharged. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995).

The Board has also inferred knowledge where the reasons for the discipline are baseless, unreasonable, or contrived so as to raise a presumption of wrongful motive, or where the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *Montgomery Ward*, supra at 1253.

Applying the above criteria, I find that compelling circumstantial evidence warrants the inference that Respondent knew of the union activities of Goldblatt and Greene, and that it discharged them because of those activities in violation of Section 8(a)(3) and (1) of the Act.

I find that a reasonable inference may be drawn from the circumstances in this case that Respondent was aware of the union activities of Goldblatt and Greene when they were discharged, and that the discharges were motivated by that support. I rely on the following factors in reaching this conclusion:

- (1) Goldblatt and Greene were the two most prominent supporters of the Union. Greene obtained signatures of about 20 employees, nearly two-thirds of the entire unit.² He solicited them and obtained their signatures at the workplace. Greene advised Cutrona of the extensive nature of his organizational activities. Goldblatt acted as "lookout" when Greene solicited their fellow employees, and engaged in a discussion with Cutrona about his card signing. The discharge of the most active employees in a union campaign provides support for a finding that the employer knew of their union activities. *T. K. Harvin & Sons*, 316 NLRB 510, 527 (1995).
- (2) The timing of the discharges occurred shortly after it became known to management that the Union sought to organize its employees. Thus, union representatives advised Owner Gato on October 4 that it sought representation for the workers. On October 6, Greene was discharged. It should be noted, in this regard, that Cutrona testified that the conversation with Greene in which Greene told him that he had obtained all, or nearly all the employees' signatures on cards, occurred on October 5, only 1 day before his discharge. Similarly, Goldblatt was suspended on October 6, only 2 days after he told Cutrona that he signed a card for the Union. The close timing between union activities and action taken against employees has been found to be suggestive that the employer knew of the union activities of the dischargees. Matthews, supra at 77; Greco & Haines, Inc., 306 NLRB 634 (1992). In addition, both Goldblatt and Greene were disciplined the same day by the same person, Kahlert. Montgomery Ward, supra at 1254.
- (3) Respondent's top management possessed general knowledge of union activities. Thus, Gato was told by union representatives, according to Kahlert, that the Union said that it "represents the employees." That phrase may be taken to mean that Kahlert believed that the Union represented all the employees. I note that Union Representative DeMaio testified that he told Gato that the Union represented a "majority" of employees, but nevertheless, Kahlert's testimony, together with Cutrona's testimony that Greene told him that he signed up all or nearly all the employees, and together with Goldblatt's testimony that upon telling Cutrona that he signed a card, Cutrona commented that "that makes everyone," supports a finding that Kahlert believed that virtually all the employees had signed

² The Report on Challenged Ballots states that there were about 33 eligible voters, of whom 26 voted.

cards for the Union. Inasmuch as Respondent possessed knowledge of widespread support for the Union, it may be inferred that it accordingly, possessed sufficient knowledge to suspect Goldblatt and Greene of engaging in union activity. *Schaeff, Inc.*, 321 NLRB 202, 217 (1996).

- (4) Respondent displayed strong animus toward the union activities of its employees. Gato "threw the Union out"; Cutrona told Greene that Respondent's response to unionization would be to discharge everyone; and Cutrona told Goldblatt that the Union was bad, and should not represent the employees. I also found in my decision that Cutrona unlawfully interrogated Goldblatt as to why he signed a card for the Union.
- (5) I have also found in my decision that Respondent had not established that it would have discharged Goldblatt and Greene even in the absence of their union activities. *Wright Line*, 251 NLRB 1083 (1980).

In sum, under the "confluence of circumstances" in this case, including the facts that (a) Respondent knew of the Un-

ion's organizing campaign; (b) Respondent had been informed that the Union represented the employees and responded to such information with unlawful antiunion animus; and (c) 2 days after the Union's visit, after they admitted their union activities to Supervisor Cutrona, Respondent discharged Greene and suspended Goldblatt, and later discharged Goldblatt for reasons which were not substantiated, I infer that Respondent knew of the union activities of Goldblatt and Greene.

I accordingly reaffirm the findings of fact and conclusions of law in my decision, and conclude that the General Counsel has made a prima facie showing that Goldblatt and Greene were unlawfully discharged, and that Respondent has not established that it would have discharged them even in the absence of their union activities. *Wright Line*, supra.⁴

³ Montgomery Ward, supra at 1255.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.